Supreme Court, U.S.
FILED
941353 FEB 8 1995
OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1994

RICHARD MANNO,

Petitioner,

vs.

STATE OF NEW YORK and JUDITH MANNO,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD MANNO
Petitioner, Pro Se
43 Concklin Road
Pomona, New York 10970
(914) 354-4573

QUESTIONS PRESENTED FOR REVIEW

I. Whether a Federal District Court was correct to deny Petitioner a hearing.

A. Whether a "domestic relations exception" precludes Federal Courts from examining state laws for constitutionality as drafted, as applied, and/or both.

B. Whether a "domestic relations exception" precludes Federal Courts from examining state actions for constitutionality regarding due process, equal protection, non-discrimination, and other constitutionally prohibited or mandated criteria.

C. Whether a "domestic relations exception" precludes Federal Courts from handling suits *not* originated federally for "diversity of citizenship" reasons.

D. Whether a "domestic relations exception" precludes Federal Courts from intervening when the relief sought (or likely to be granted) is not a direct divorce, alimony, or child support *decree*, but rather instructions to state courts to fairly afford a appellant his rights, granting him a fair hearing and judgment.

E. Whether a "domestic relations exception" precludes Federal Courts from intervening when matters involved are beyond the very specific areas of "divorce," "alimony," and "child custody."

II. Whether the United States Court of Appeals was correct to affirm the hearing denial.

> Whether federal intervention to the limited extent of requiring states to act constitutionally, and *without* the issuance of direct divorce, alimony, or child support decrees, would necessarily "eviscerate the domestic relations exception" (quotation from page 3 of the United States Court of Appeals Order of November 10, 1994).

PARTIES TO THE PROCEEDING

Petitioner:

RICHARD MANNO, *Pro Se*
43 Concklin Road
Pomona, New York 10970
(914) 354-4573

Respondents:

STATE OF NEW YORK
Represented By:
G. OLIVER KOPPEL
Attorney General of the State of New York
Litigation Bureau, 24th Floor
120 Broadway
New York, New York 10271

JUDITH MANNO
Respresented by:
KANTROWITZ & GOLDHAMER, P.C.
747 Chestnut Ridge Road
Chestnut Ridge, New York 10977

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding	iii
Table of Contents	iv
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutes and Constitutional Provision Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
Conclusion	15

TABLE OF CITATIONS

Cases Cited:

Ankenbrandt v. Richards, __ U.S. __, 112 S. Ct. (1992) 7, 10, 11, 13

Solomon v. Solomon, 516 F.2d 1018 (3rd Cir. 1975) 13

Coppedge v. United States, 369 U.S. 438 (1962) 14

Contents

Page

United States Constitution Cited:

Fifth Amendment 3

Fourteenth Amendment 3

Statute Cited:

28 U.S.C. § 1254(1) 1

Other Authority Cited:

New York Child Support and Standards Act of 1989 ..... 2, 3, 4

APPENDIX

Appendix A — Order of Dismissal by the United States District Court, Southern District of New York Dated April 18, 1994 ..... 1a

Appendix B — Civil Judgment by the United States District Court, Southern District of New York Dated April 18, 1994 ..... 3a

Appendix C — Order by the United States Court of Appeals for the Second Circuit Filed November 10, 1994 ..... 4a

OPINIONS BELOW

The Order entered April 18, 1994 of the United States District Court for the Southern District of New York, Dismissing the Petitioner's Complaint (1a).

The Order Entered November 10, 1994 of the United States Court of Appeals for the Second Circuit Affirming the Judgment of the District Court (4a).

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Second Circuit was entered on November 10, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

(i) Date of Entry of Order for which Review is sought:
November 10, 1994
Order #94-7510 from the United States Court of Appeals for the Second Circuit.

(ii) United States Supreme Court review is requested due to:

(a) denial of a hearing (*sua sponte* dismissal of complaint) by a United States District Court regarding:

the constitutionality of New York State's Child Support Standards Act,

the denial of appellant's due process rights under the United States Constitution by applying said Act to appellant in a New York State court action,

the constitutionality of the general implementation of said Act,

the constitutionality of the Act, its general implementation, and its specific application to appellant all combined,

the denial of appellant's due process rights by New York courts by denying him a hearing on the matter of a certain "stipulation" and its surrounding issues.

(b) affirmation of the hearing denial (*sua sponte* dismissal of complaint) of the District Court by the United States Court of Appeals for the Second Circuit.

STATUTES & CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provisions involved in this case relate to actions prohibited to the states; the bill of rights and other due process, equal protection, and non-discriminatory sections and amendments; prohibitions against harsh and excessive punishment and where *excessive*; to taking without compensation; and the federal guarantee of a republican form of state government and other guarantees to individual citizens.

The statutes involved in this case are the New York Child Support Standards Act of 1989, the Federal Domestic Relations Enforcement Act, and related laws and practices.

These have not been included verbatim in this Petition for reasons of brevity, economy, and since a direct ruling by this Court is not requested on their compatibility, but rather a remand to an appropriate lower Federal Court is requested where they can be examined at length.

STATEMENT OF THE CASE

Federal intervention by the United States District Court, Southern District of New York, was sought because Petitioner contends, in part, that his Federal Constitutional Rights were violated in a New York action.

This is not an appeal of a domestic relations finding. It goes instead to the constitutionality of the law and procedure. The issues include:

A. The application of an *ex post facto* New York law, namely the Child Support Standards Act effective September 1, 1989 (Respondent Judith Manno having commenced an action in January of 1989, and other significant events having occurred some years prior to 1989);

B. Denial of Petitioner's due process rights under the Fifth and/or Fourteenth Amendments of the United States Constitution due to application of this law in this action;

C. Said law being unconstitutional for other reasons also;

D. The application of said law also being unconstitutional;

E. The combination of the law and its application being unconstitutional;

F. Denial of a hearing on the matter of a certain "stipulation" and its surrounding issues, the right to be heard being perhaps the most fundamental of due process rights.

Petitioner Richard Manno and Respondent Judith Manno were married in New Jersey on July 1, 1967, in a religious ceremony which included a vow referring to the precepts of the religious organization of which they were and are members.

Eight presently living children ensued from their union, current ages being 25 through 9. The eldest four children were born in New Jersey; the next three were born in (the Federal Territory of) the United States Virgin Islands; the youngest child was born April 1, 1985 in Florida.

All ten people were living in New York State from approximately September 1985 for several years. Approximately January, 1989, Judith Manno commenced a divorce action against Richard Manno.

Thereafter, New York State passed its Child Support Standards Act effective September 1, 1989.

Petitioner contends the act and/or its implementation and/or its application to him is unconstitutional for several reasons, to be fully explained in an appropriate Federal Court as, it is most respectfully requested, to be directed by this United States Supreme Court.

Approximately June 6, 1990, an oral stipulation was seemingly entered into between Petitioner and Respondent.

At a state court trial in September, 1990 Petitioner contended that the stipulation should be set aside for four reasons:

A. It might not yet have been in effect.

B. Petitioner contended he did not know or appreciate the nature or consequences of the agreement on a macro level, and to a significant extent on a micro level. He was emotionally distressed and upset at the time of the stipulation with disjointed thinking and no resistance, due to the distress and upset.

Petitioner contended he could show this in three ways:

1. His actions prior to the (June 6, 1990) court day;

2. His actions during that court day;

3. Specific elements of the stipulation, not just because they were bad for him, but because they would demonstrate he was not aware of the nature or consequences of what he was doing.

C. The agreement

1. In its entirety;

2. And specific portions of it;

3. And the way they came about is unconscionable.

D. If the agreement actually was in effect, then it had been materially breached (by Respondent) and Petitioner therefore was entitled to have it cancelled if he so wished.

The trial level New York State Court would not allow Petitioner to enter any evidence on this issue and essentially dismissed it.

Petitioner appealed much of the trial court's decision(s) to the New York State Appellate Division. In mid 1993, the Appellate Division remanded portions of the trial court's decision to the trial court, but denied Petitioner relief regarding the stipulation.

Petitioner requested the New York Appellate Division for reargument and/or permission to appeal to New York State's highest court, which request was denied in October, 1993. By not giving him a fair hearing and/or allowing him to introduce

evidence, Respondent contends his due process rights were violated.

Petitioner then filed a complaint with the United States District Court for the Southern District of New York against the State of New York and Judith Manno in November, 1993.

On April 18, 1994, the United States District Court dismissed Petitioner's complaint citing "the domestic relations exception to federal jurisdiction".

In June, 1994, the New York State Trial Court Judge refused himself from further proceedings in this case because he "could not remain objective" towards Petitioner. Although this action took place after the events mentioned in Petitioner's original federal complaint, the loss of objectivity had to have occurred significantly earlier, and I believe will be shown to be part of Petitioner's unfair treatment by the New York State Courts.

Also in June, 1994, appellant appealed the *sua sponte* dismissal of the Federal District Court to the United States Court of Appeals for the Second Circuit.

On November 10, 1994, the United States Court of Appeals affirmed the District Court's dismissal, which affirmation is the cause of this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits that the United States Court of Appeals has:

(i) Decided an important question of federal law which has not directly been, but should be, settled by the United States Supreme Court;

(ii) And although the ruling of the Appeals Court does not seemingly, *directly* conflict with applicable decisions of the Supreme Court;

a. It seems to Petitioner to go *significantly beyond* the most relevant Supreme Court ruling (*Ankenbrandt v. Richards*, ___ U.S. ___, 112 S. Ct. (1992));

b. It respectfully seems to Petitioner to go *contrary to the overall theme* of the *Ankenbrandt* ruling, which seems to limit the "domestic relations exception" rather than expand it;

c. It respectfully seems to Petitioner to significantly *infringe on the rights of the federal judiciary*;

(iii) And, if allowed to become a precedent, the decision has the potential to allow significant undermining of our constitution, by potentially "creative" state governments in the future.

The central problems are the unconstitutionality of a New York State law and the denial of due process in that the New York State courts will not afford me a full and complete hearing (or seemingly any hearing at all).

The Federal District Court and the Appeals Court seemingly have based their refusal to hear my complaint on the "domestic relations exception." For reasons which I shall advance below, I respectfully contend that the "domestic relations exception" recognized to date by the United States Supreme Court, as well as the cases cited by the District Court Judge, do not apply, and that to apply it to my case would be a significant (and, respectfully, unwise) expansion of said exception.

The five cases cited by the District Court were all brought before Federal Courts due to diversity of citizenship. They therefore should not serve as precedent to exclude cases (such as mine) brought for cause of unconstitutionality of laws and/or actions/inactions. Therefore, when the issue is a constitutional challenge to a law (such as in my case) the subject matter of the law, be it divorce, alimony, or otherwise is and/or should be of no import. My case should therefore be allowed to proceed.

At the outset, I wish to make clear that I will not be asking a Lower Federal Court for "the issuance of a divorce, alimony, or child custody decree." I will be asking the Lower Court to:

> Find a state law unconstitutional in itself and/or its implementation and/or its specific application to me;
>
> Find that the state courts did not afford me due process and/or violated other of my rights by not giving me a full, fair, and complete hearing;
>
> And direct the state courts to then proceed accordingly and grant me my full rights and hearings under laws and procedures in accord with our Constitution.

Furthermore, with every respect, I submit that the Appeals Court is not correct that to examine state laws and actions for constitutionality in the domestic relations area would "eviscerate the domestic relations exception." Once certain that the states were acting constitutionally, the domestic relations exception would become even stronger, so long as the states continued to so act.

In addition, my understanding is that Attorney General Reno recently announced that she intends to enhance federal enforcement of a federal law which criminalizes non-compliance with certain state court orders/decrees in the domestic relations area.

Also, this intertwining of Federal/Criminal with (nominally) State Civil law does, Petitioner contends, have the effect of moving this entire section of laws from the civil area to the criminal area, and this entitles citizens to the added protections afforded in criminal actions. In addition, Petitioner contends that the relevant state law is actually a criminal law in the guise of a civil law, and that the above intertwining is further proof of same.

And to have Federal Courts enforce state judgments/decrees which may have been the result of unconstitutional laws or processes (or of no law or due process at all) without examination simply because it falls in the domestic relations area is just not going to be a good or proper situation in which to find ourselves.

Indeed (and fortunately this seems remote currently, but then so do many evil things at times), I'm certain your Honors can see far more clearly than I how refusal to examine a segment of our laws for constitutionality could potentially lead to the establishment of at least a partial tyranny by the "creative" tying of deliberately malicious unconstitutional laws and practices to an area of law excluded from constitutional review.

Regarding the *Ankenbrandt* decision cited by the District Court.

A. *Ankenbrandt,* Section III, last paragraph, first sentence:

> By concluding as we do, that the domestic relations exception encompasses *only* cases involving the issuance of a divorce, alimony, or child custody decree, we necessarily find that the Court of Appeals erred by affirming the District Court's invocation of the exception. (emphasis added).
>
> I am not asking a District Court to grant or undo a divorce decree.
>
> I am not asking a District Court to grant or undo an alimony decree (in fact, there is no alimony involved in this case).
>
> I am not asking the District Court to grant or undo a child custody decree.
>
> Therefore no domestic relation exceptions should here apply.

B. Further, my layman's reading of *Ankenbrandt* seems to indicate that the domestic relations exception is neither constitutional, nor codified, but simply a matter of precedent subject to common sense override on a case by case basis.

Consequently, to contend that *Ankenbrandt* in any way denies our Federal Courts the authority to examine the constitutionality of *any* state law or action or inaction does not seem to me to be the intent of the ruling. Indeed, to a layman, the

oaths of office taken by our Federal (and New York State) officials and Judges seemingly mandate that such examination be made on application, with no exception.

C. 1. And should a state at some future time, for example, pass a law mandating the infliction of cruel and unusual torture and/or death on one party or another coincident with a decree of divorce, is *Ankenbrandt* to be read so as to prohibit the Federal Courts from finding such law unconstitutional, or even in such an extreme case, dissolving the divorce decree itself if the Court so chose?

First, I contend that *Ankenbrandt* does not read so as to prohibit such Federal Court action, even directly related to the issuance of a (non-) divorce decree.

Second, I contend that the overall tone of *Ankenbrandt,* if not indeed precise wording the full import of which I was unable to fathom, indicates that the Federal Courts *should* intervene in such an instance in one way or other.

And thirdly, even if I did not read *Ankenbrandt* correctly, I contend that it should be read as I believe, or justice could not be served.

2. Further, *Ankenbrandt* notes (Section IV, paragraph 1) that "abstention should *rarely* be invoked because the Federal Courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them' " (emphasis added).

Also, Justice Blackmun's concurring opinion also clearly states "the Court is correct that abstention '*rarely* should be invoked.' " (Section IIA, last paragraph, emphasis added).

D.1. *Ankenbrandt* uses the same very precise and restrictive

language at least seven times (referring specifically *only* to "divorce", "alimony", "child custody") as follows:

Section III, paragraph 4 (twice)

Section III, paragraph 5 (once)

Section III, paragraph 6 (once)

Section IV, paragraph last (twice)

Section V, main paragraph (once)

2. And Justice Blackmun's concurring opinion uses the same very precise and restrictive language (referring *only* to "divorce, alimony, and child custody") as follows:

Introductory paragraph (once),

Section I, paragraph 1 (once),

Section IIA, paragraph 2 (once).

3. There is no alimony in this case. The grounds for granting divorce in New York are not being challenged. The constitutionality of the New York child *support* act, levels, general implementation, and specific application is being challenged, but not the constitutionality of New York child *custody* laws at this time.

4. Therefore even if this were a suit raised due to citizenship diversity and not constitutionality, no domestic relations exemption should apply since the subject matter is not specifically included in the exemption.

The four *non-Ankenbrandt* cases cited by the District Court are earlier than *Ankenbrandt,* and are not United States Supreme Court decisions. Hence, it would seem that *Ankenbrandt* supersedes them, as well as noting in footnote No. 2 the prior diversity in application of any "*diversity* exception" by various Appeals Courts.

Hence, the other cases must all defer to *Ankenbrandt.* And all the cases, along with *Ankenbrandt,* refer only to a domestic relations exception for diversity of citizenship cases; not for constitutional challenge.

Of further note is the dissenting opinion by Judge Gibbons in the *Solomon* case (specifically the fifth paragraph from the end beginning "this brings me to"), as well as other portions of the cited cases, which seem to demonstrate that there is strong precedent for the Supreme Court's precise terminology of "divorce", "alimony", and "child custody" in *Ankenbrandt,* and to the extent the precise terminology, on close inspection, did not fit, to *not* withhold exercise of jurisdiction.

For all of the reasons advanced above, for all arguments which could further be made on my behalf but of which I am either unknowledgeable or too unskilled to make, separately and in their totality, I most respectfully contend that no "domestic relations exception" does or should apply to my case, and that my case should be permitted to proceed.

Regarding Petitioner's Good Faith

A. I have paid the $105.00 docket/filing fee(s) for the appeal to the Appeals Court, and the $300.00 docket/filing fee for Your Honors' Court. I have no or negligible income at this time. I do not part with that amount of money lightly at this point.

If non-payment of moneys might potentially subject me to being considered as not acting in good faith, then I contend that a payment of some nature should have an opposite effect.

B. The issues I raise are not frivolous, nor am I. I am hard pressed to think of an other area of law which has such a major impact on such a large (if not an actual majority) of our nation's citizenry, as the whole domestic relations area.

To then contend that state laws and practices in this area cannot even be examined for constitutionality is no small or frivolous matter, but can (and does, I submit) lead to severely detrimental consequences for large numbers of citizens, including myself.

C. If I read *Coppedge* correctly, "the burden of showing that the right to appeal has been abused is on the party making the suggestion" (Justice Stuart and Brennan's concurring opinion(s), end of paragraph 2). I respectfully submit that no such showing has been made in this case.

D. If I read the decisions of the District and Appeals Courts correctly, it is because Their Honors believe I am wrong regarding whether the Federal Courts are barred from intervening in this case that they contend that this appeal is frivolous or not in good faith. Again, I am not about this for other than serious reasons, and I just don't believe the domestic relations exception applies to this case. What else can or should I do except appeal?

E. I therefore respectfully request that certifications of frivolity or non-good faith be stricken.

CONCLUSION

For all of the foregoing advanced reasons, individually and/or taken together as a whole, Petitioner respectfully requests that the United States Supreme Court:

A. Strike and/or overturn allegations regarding Petitioner acting frivolously or in other than good faith;

B. Directly instruct an appropriate Federal Court to hear Petitioner's Federal complaint in full, or grant certiorari; and

C. Afford such other relief to Petitioner as it feels to be just and proper.

Respectfully submitted,

RICHARD MANNO
Petitioner, Pro Se
43 Concklin Road
Pomona, New York 10970
(914) 354-4573

APPENDIX A — ORDER OF DISMISSAL BY THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK DATED APRIL 18, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

94 CIV 2798

RICHARD MANNO,

Plaintiff,

-against-

THE STATE OF NEW YORK; JUDITH MANNO,

Defendants.

ORDER OF DISMISSAL

Plaintiff, brings this case pro se alleging that his constitutional rights were violated when New York state courts applied the Child Support Standards Act in his divorce action and denied plaintiff "a hearing on the matter of a certain 'stipulation' and its surrounding issues." Complaint, at 1; *see Manno v. Manno*, 600 N.Y.S. 2d 968 (Sup. Ct. App. Div. 1993). We grant plaintiff's request to proceed in forma pauperis, but dismiss the complaint for the reasons discussed below.

The domestic relations exception to federal jurisdiction bars this court from considering plaintiff's claim. The recent Supreme Court decision, *Ankenbrandt v. Richards*, __U.S. __, 112 S. Ct. 2206 (1992) reaffirmed the continued validity of the domestic relations exception, stating that the exception divests federal courts of jurisdiction "to issue divorce, alimony and child custody decress." *Id.*, 112 S. Ct. at 2215. Plaintiff's claim falls within the

ambit of cases excluded by *Ankenbrandt* because the gravamen of his claim involves child support — an area at the core of the domestic relations exception. *See Csibi v. Fustos*, 670 F.2d 134, 137 (9th Cir. 1982); *Jagiella v. Jagiella*, 647 F.2d 561, 565 (5th Cir. 1981); *Solomon v. Solomon*, 516 F.2d 1018 (3d Cir. 1975); *Cook v. Winters*, 645 F. Supp. 158, 159 (S.D. Tex. 1986). The issues of child visitation rights, custody and divorce decrees are better left to the state courts which are more experienced in interpreting and applying their own domestic relations laws.

Accordingly, the complaint, filed in forma pauperis under 28 U.S.C. § 1915(a), is dismissed pursuant to 28 U.S.C. § 1915(d). See Fed. R. Civ. P. 12(b)(1) and 12(h)(3). We certify pursuant to 28 U.S.C. § 1915(a) that any appeal from this order would not be taken in good faith. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED

s/ Thomas P. Griesa
THOMAS P. GRIESA
Chief Judge

Dated: APR 18 1994
New York, New York

APPENDIX B — CIVIL JUDGMENT BY THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK DATED APRIL 18, 1994

94 CIV. 2798

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD MANNO,

Plaintiff,

-against-

THE STATE OF NEW YORK; JUDITH MANNO,

Defendants.

CIVIL JUDGMENT

Pursuant to order issued APR 18, 1994 by the Honorable Thomas P. Griesa, Chief Judge, dismissing the complaint it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed. Fed. R. Civ. P. 12(b)(1) and 12(h)(3), 28 U.S.C. § 1915(d). We certify pursuant to 28 U.S.C. § 1915(a) that any appeal from the Court's order would not be taken in good faith.

s/ Thomas P. Griesa
THOMAS P. GRIESA
Chief Judge

Dated: APR 18 1994
New York, New York

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON____

APPENDIX C — ORDER BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED NOVEMBER 10, 1994

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

94-7510

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the tenth day of November, one thousand nine hundred and ninety-four.

Present:

Honorable Thomas J. Meskill,
Honorable Ralph K. Winter,
Honorable J. Daniel Mahoney,
Circuit Judges.

RICHARD MANNO,

Plaintiff-Appellant,

v.

STATE OF NEW YORK and JUDITH MANNO,

Defendants-Appellees.

ORDER

Appeal from the United States District Court for the Southern District of New York.

Appendix C

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Richard Manno appeals, pro se, from Judge Griesa's *sua sponte* dismissal of his complaint, which alleged a violation of his constitutional rights by the New York state courts when they (i) applied the Child Support Standards Act to his divorce and (ii) denied him a hearing on certain matters. On appeal, Manno claims that the domestic relations exception does not apply to his complaint because he is not asking federal courts to rule on a divorce, alimony, or child support decree. Rather, he argues, he seeks only to require New York state courts to accord him due process.

The district court's *sua sponte* dismissal under 28 U.S.C. § 1915(d) is reviewed under a standard of abuse of discretion. *Denton v. Hernandez*, 112 S. Ct. 1728, 1734 (1992). The district court was justified in dismissing Manno's complaint because its substance ws "frivolous on its face." *Robles v. Coughlin*, 725 F.2d 12, 15 (2d Cir. 1983) (per curiam). Manno's claim is frivolous because it is grounded on a legal theory that is "indisputably meritless." *See Neitzke v. Williams*, 490 U.S. 319, 327 (1989).

Manno's claims relate to a divorce proceeding and the child support issues that have arisen in the penumbra of such proceedings. The domestic relations exception precludes the federal court from issuing "divorce, alimony, and child custody decrees." *Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2215 (1992).

Appendix C

Manno asserts that his complaint does not fall within the ambit of the domestic relations exception because he is not asking for a decree, but rather for federal intervention in an unjust state proceeding. Accepting this assertion would, of course, eviscerate the domestic relations exception.

We will impose sanctions under Federal Rule of Appellate Procedure 38 only if there is a "clear showing of bad faith." *Schiff v. United States*, 919 F.2d 830, 834 (2d Cir. 1990) (internal quotation omitted), *cert. denied*, 501 U.S. 1238 (1991). Considering that Manno appeals *pro se*, and considering that his brief evinces genuine confusion about the different roles of federal and state courts, we do not believe that sanctions are appropriate at this stage.

Nonetheless, Manno is advised that future attempts to make a federal case out of his child support obligations will result in monetary sanctions. Moreover, it will also result in an injunction preventing him from certain further filings.

We therefore affirm.

s/ Thomas J. Meskill
Hon. Thomas J. Meskill, U.S.C.J.

s/ Ralph K. Winter
Hon. Ralph K. Winter, U.S.C.J.

s/ J. Daniel Mahoney
Hon. J. Daniel Mahoney, U.S.C.J.

FILED
MAR 17 1995

(2)

No. 94-1353

In The

Supreme Court of the United States

October Term, 1994

RICHARD MANNO,

Petitioner,

vs.

STATE OF NEW YORK and JUDITH MANNO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

RICHARD MANNO
Petitioner, Pro Se
43 Concklin Road
Pomona, New York 10970
(914) 354-4573

BEST AVAILABLE COPY

36 pp

QUESTIONS PRESENTED

[The Questions Presented are the same as those stated in the original Petition and are summarized here]

1. Is a federal District Court precluded, under the "domestic relations" exception to federal court jurisdiction, from considering an action alleging that a certain state law regarding child support was improperly applied, or is unconstitutional under due process or equal protection standards, or under other standards relating to the United States Constitution or to other federal law or principles, as appearing from these circumstances?

2. Does the "domestic relations" exception to federal jurisdiction preclude federal court from intervening when the relief sought is not an actual decree as to divorce, alimony, or custody, but rather relief which a federal court is uniquely situated to provide?

3. Does the "domestic relations" exception to Federal jurisdiction preclude federal courts from intervening in matters arising from a domestic relations background but which do not present issues of divorce, alimony, or custody?

4. Was the United States Court of Appeals for the Second Circuit correct when it affirmed dismissal of the action by the United States District Court?

PARTIES TO THE PROCEEDING

As noted in Petitioner's original Petition, the parties to the proceedings below are the same parties as stated in the caption of this Petition:

Petitioner:

RICHARD MANNO, *Pro Se*
43 Concklin Road
Pomona, New York 10970
(914) 354-4573

Respondents:

STATE OF NEW YORK
Represented By:
G. OLIVER KOPPEL
Attorney General of the State of New York
Litigation Bureau, 24th Floor
120 Broadway
New York, New York 10271

JUDITH MANNO
Represented by:
KANTROWITZ & GOLDHAMER, P.C.
747 Chestnut Ridge Road
Chestnut Ridge, New York 10977

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	1
Statutes and Constitutional Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	7
Conclusion	10

TABLE OF CITATIONS

Cases Cited:

Ankenbrandt v. Richards, 112 S. Ct. 2206 (1992) 7, 8, 9, 10

Burford v. Sun Oil Co., 319 U.S. 315 (1943) 6

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1975) 6

Contents

Page

Manno v. Manno, 196 App. Div. 2d 488, 600 N.Y.S. 2d 968 (1993) 3

Railroad Commission v. Pullman Co., 312 U.S. 496 (1941) 6

Robles v. Coughlin, 725 F.2d 12 (2nd Cir. 1983) 4

Williams v. Lambert, No. 94-7290, United States Court of Appeals for the Second Circuit, decided February 1, 1995 .....2, 5, 7, 9, 10

Younger v. Harris, 401 U.S. 37 (1971) 6

Statutes Cited:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1332 8

New York Domestic Relations Law § 240 4

New York Child Support Standards Act of 1989 .....1, 2, 3, 5, 9

United States Constitution Cited:

Fifth Amendment 2

Fourteenth Amendment, Section 1 ..... 2, 5

Contents

Page

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Second Circuit in *Williams v. Lambert* Dated February 1, 1995 ..... 1sa

OPINIONS BELOW

On November 10, 1994, the United States Court of Appeals for the Second Circuit affirmed dismissal of Petitioner's Complaint by the United States District Court for the Southern District of New York. (*See* Original Petition at App. 4a).

On April 18, 1994, the United States District Court dismissed Petitioner's Complaint. (*See* Original Petition at App. 1a).

STATEMENT OF JURISDICTION

Judgment of the Second Circuit was entered on November 10, 1994. There was no motion for rehearing or rehearing en banc (since the Second Circuit opinion which is the subject of this present Supplemental Brief had not then been issued). The original Petition here was filed within 90 days of that judgment, on February 10, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Review by this Court is requested to determine the correctness of refusal by federal courts, under the "domestic relations" exception to federal jurisdiction, to consider Petitioner's action in which he challenged the application and constitutionality of the New York State Child Support Standards Act. Petitioner further claimed denial of his due process rights by New York state courts as to his challenges to an agreement relating to assets distribution.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

[And see notations in Petition, at 2]

United States Constitution, Fifth Amendment [pertinent part]:

> No person shall be. . .deprived of life, liberty, or property, without due process of law. . . .

United States Constitution, Fourteenth Amendment:

> Section 1
>
> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Child Support Standards Act of 1989.

STATEMENT OF THE CASE

This Supplement to this Petition for a Writ of Certiorari is submitted to alert this Court to a recent decision, *Williams v. Lambert*, United States Court of Appeals for the Second Circuit, No. 94-7290, decided February 1, 1995 (*see* Supp. App. beginning at 1sa). This decision, issued just prior to the filing of this Petition, bears significantly upon the issues raised here.

As indicated in Petitioner Richard Manno's original Petition, this matter arose from a domestic relations situation in New York. Petitioner Manno and Respondent Judith Manno were married in New Jersey on July 1, 1967. Eight presently living children ensued from that marriage, now between the ages of 25 and 10. The eldest four were born in New Jersey, the next three were born in the Virgin Islands, and the youngest was born (on April 1, 1985) in Florida. The family resided in New York from approximately September, 1985.

In January, 1989, Judith Manno commenced a divorce action against Richard Manno. (Subsequently, New York enacted its Child Support Standards Act, effective September 1, 1989).

On June 6, 1990, an oral stipulation was entered into between Richard Manno and Judith Manno in a New York court (Supreme Court, Rockland County (Meehan, J.)) as to distribution of assets. In September, 1990, as proceedings continued regarding child support, educational expenses for the children, and medical and dental care for the children, Petitioner challenged the stipulation. Petitioner alleged the stipulation was not effective, was agreed to by him without a full understanding of it, and was arranged at a time when he was emotionally distressed. He also contended the stipulation, and the way it came about, was unconscionable. Further, he contended the agreement had been breached by Judith Manno, rendering Petitioner's duties under the agreement voidable. Consequently, he asked that it be set aside.

The New York Supreme Court (Meehan, J.) denied, without a hearing, Petitioner's motion to set aside the agreement. On February 28, 1991, the court, ruling on various matters and applying the New York Child Support Standards Act which became effective only on September 1, 1989—*after* the Complaint in this matter was filed—refused Petitioner's challenge to the agreement. It entered an Order as to payments by Petitioner of child support, including a directive that he pay costs of each child's college tuition, room, and board.

Petitioner appealed to the New York Appellate Division. On June 4, 1993, the Appellate Division remanded portions of the trial court's decision, but denied relief as to the stipulation. *See Manno v. Manno*, 196 App. Div. 2d 488, 600 N.Y.S. 2d 968 (1993). The Appellate Division stated, "We find that the court properly denied the husband's motion to set aside the stipulation of settlement." 600 N.Y.S. 2d at 970. It recalculated child support

and other financial obligations, and remanded these matters. In its general review of the issues, the Appellate Division also applied the Child Support Standards Act, specifically New York Domestic Relations Law § 240.

Petitioner sought a rehearing before the Appellate Division, and also sought permission to appeal to the New York Court of Appeals. These requests were denied in October, 1993.

Petitioner then, in November, 1993, submitted his Complaint in the United States District Court for the Southern District of New York, naming Judith Manno and the State of New York as defendants. Petitioner contended the application by the New York courts of the Child Support Standards Act was improper and unconstitutional and challenged the Act's constitutionality. He did not seek, per se, a new or modified divorce or support decree. Further, the action was *not* based upon diversity jurisdiction.

On April 18, 1994, the District Court (Griesa, J.), dismissed the Complaint *sua sponte*. (Petitio, App. 1a). The court's sole basis for its action was the "domestic relations" exception to federal jurisdiction. The District Court stated "the gravamen of [Petitioner's] claim involves child support—an area at the core of the domestic relations exception." (Petition App. 2a). The District Court also entered an order stating that any appeal from the dismissal "would not be taken in good faith." (Petition App. 3a).

Petitioner appealed to the Second Circuit. On November 10, 1994, the Second Circuit affirmed the District Court's dismissal of Petitioner's Complaint. Reviewing the dismissal under an abuse of discretion standard, the Second Circuit stated the District Court's action was justified because the Complaint was "frivolous on its face." Citing *Robles v. Coughlin*, 725 F.2d 12 (2nd Cir. 1983). The Second Circuit contended the Complaint

involved "a divorce proceeding and the child support issues that have arisen in the penumbra of such proceedings." It thus concluded the "domestic relations" exception to federal jurisdiction applied. (*See* Petition App. 5a-6a). The Second Circuit further remarked that to permit the federal courts to pursue Petitioner's challenges regarding the Child Support Standards Act "would, of course, eviscerate the domestic relations exception." (Petition App. 6a).

However, in *Williams v. Lambert*, No. 94-7290, decided February 1, 1995 (*see* Supp. App. 1sa, *et seq.*), *the Second Circuit itself has modified this position*, contradicted its Opinion in this matter, and adopted the approach advanced by Petitioner here. *Williams* involved a support agreement arranged by two parties, unmarried to each other, concerning an out-of-wedlock child born to them in 1988.

The mother (Williams) sought support from the father (Lambert). The result of this action was an agreement in which the father agreed to pay support ($250,000 lump sum), but denied paternity. Williams subsequently brought an action in United States District Court, on November 10, 1992, to set aside the agreement. She charged Lambert had misrepresented his financial condition and had induced her into agreeing to it. (*See Williams* at Supp. App. 3sa-5sa).

Williams based her action on a challenge to a provision in the New York Child Support Standards Act prohibiting re-examination of a support agreement for an illegitimate child. Re-examination is not precluded for a support agreement involving legitimate children. She contended, among other things, that this provision violates the Equal Protection Clause. The District Court (Sprizzo, J.), however, stayed federal proceedings pending resolution of a state court action filed by Lambert (on November 5, 1992, refiled by him on June 15, 1993 after the original state court complaint was removed by Williams to the District Court)

alleging breach of the agreement by Williams and seeking recovery for alleged intentional infliction of emotional distress. (This was a *Pullman* abstention, *see Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941)).

On appeal by Williams from this stay order, the Second Circuit *reversed*. The court decided Williams had standing to bring her action (based chiefly on her equal protection claim, *see* Supp. App. at 10sa). It discussed *Pullman* as well as other forms of abstention, finding them inapplicable.[1] More directly, *the Second Circuit then commented on the "domestic relations" exception to federal jurisdiction* (emphasis supplied):

> Lastly, the general policy that federal courts should abstain from deciding cases that involve matrimonial and domestic relations issues is not applicable here. The matrimonial exception to diversity jurisdiction, as articulated in *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859), is still in effect today—federal courts will not exercise jurisdiction over cases on the subjects of divorce, alimony or the custody of children. *Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2214-15 (1992); *American Airlines, Inc. v. Block*, 905 F.2d 12, 14 (2d Cir. 1990). *See also, Phillips, Nizer, Benjamin, Krim & Ballon v. Rosensteil*, 490 F.2d 509 (2d Cir. 1973). However, the Court in *Ankenbrandt* held that *the matrimonial exception to federal jurisdiction is not based on Article III of the*

---

1. *See* discussion at Supp. App. 11sa-16sa, discussing *Pullman* abstention issues—not involved in this present Petition—and abstention under principles established in: *Younger v. Harris*, 401 U.S. 37 (1971); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1975).

> *Constitution but is instead an interpretation of the diversity statute*, 28 U.S.C. § 1332. 112 S. Ct. at 2213-14. It also found that the exception is very narrow. The Court stated that "[t]he *Barber* Court . . . did not intent to strip the federal courts of authority to hear cases arising from the domestic relations of persons unless they seek the granting or modification of a divorce or alimony decree," *id*, at 2214, or a child custody decree. *Id*. at 2215.
>
> This case does not involve such a decree, and it is before this Court on federal question jurisdiction, not diversity. Therefore, the matrimonial exception does not apply.

Supp. App. 19sa-20sa. The Second Circuit concluded abstention should not be invoked. The District Court matter should proceed.

REASONS FOR GRANTING THE WRIT

As described in Petitioner's original Petition, and as further declared by the Second Circuit in *Williams*, this matter does not involve the "domestic relations" exception to Federal jurisdiction. This Court in *Ankenbrandt*, *supra*, reviewing dismissal of an action brought in a United States District Court, based on diversity of citizenship, seeking recovery for alleged sexual and physical abuse of the complainant's children, found the complaint should proceed. It reversed the Fifth Circuit's affirmance of dismissal.

Discussing whether there is a domestic relations exception to federal jurisdiction, this Court concluded such an exception might not clearly be present within the jurisdiction described for federal courts in Article III of the Constitution, but could reasonably be derived *from the nature of diversity jurisdiction* as

described in 28 U.S.C. §1332. This Court stated, at 119 L. Ed. 2d at 480:

> We thus are content to rest our conclusion that a domestic relations exception exist as a matter of statutory construction not on the accuracy of the historical justifications on which it was seemingly based, but rather on Congress' apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948, when the statute limited jurisdiction to "suits of a civil nature at common law or in equity."

This Court cautioned, however, that previous case law on the issue:

> did not intend to strip the federal courts of authority to hear cases arising from the domestic relations of persons unless they seek the granting or modification of a divorce or alimony decree. The holding of the case itself [*Barber*] sanctioned the exercise of federal jurisdiction over the enforcement of an alimony decree that had been properly obtained in a state court of competent jurisdiction.

The Court also determined that restricting the domestic relations exception to matters of court decrees involving alimony or support, or matters of child custody, is practical given that such matters often must be monitored by the court and state courts are more "eminently suited to work of this type than are federal courts." Thus, this Court in *Ankenbrandt* declared that "the domestic relations exception encompasses only cases involving the issuance of a divorce, alimony, or child custody decree" and further found that the Court of Appeals "erred by affirming the

District Court's invocation of this exception" in the case before it. The *Ankenbrandt* lawsuit "in no way" sought such a decree but instead was a tort action seeking recovery for alleged physical abuse of children.[2]

Here, as Petitioner has stated in his original Petition (*see* Petition at 7-11), *this matter likewise does not involve any claims to invoke or to modify a divorce decree or an alimony or custody order.* Petitioner stated clearly (*see* Petition at 8 and 10) that he is not asking the District Court to issue a divorce decree, determine alimony, or enforce a child custody order.

Rather, quite similar to the situation in *Williams*, this action alleges unconstitutional application by the New York state courts of the New York Child Support Standards Act and, generally, the refusal of the New York state courts to consider Petitioner's challenges to the June, 1990 "stipulation." He also alleges denial of due process in the various actions of the New York courts in this regard. (Petition at 8-9).

In addition, this present matter *was not based on diversity jurisdiction* (both parties reside in the State of New York). Rather, the action was brought under the general authority of the federal courts to determine important questions bearing upon due process and constitutionality of judicial treatment of its citizens. Further, even if this were a matter under diversity jurisdiction, no domestic relations exception to jurisdiction should apply since the subject matter is not within the scope of the exception described.

As previously noted (Petition at 10-12): any discussion in *Ankenbrandt* as to the domestic relations exception, to the extent

---

2. The court further discussed (*see* Section IV of opinion) various abstention issues, finding also that they did not apply to the matter before it. Again, Petitioner contends that in any event, such abstention doctrines are not at issue here since this was not the basis for the District Court's dismissal of his Complaint and the Second Circuit's affirmance of that action.

it was relied upon by the Second Circuit, is a matter of precedent subject to further review; moreover, the thrust of *Ankenbrandt* is that in a proper instance, even though the action at issue may have a domestic relations background, the federal courts *should* intervene to ensure justice has been done; and, as recently restated by the Second Circuit itself in *Williams*, *Ankenbrandt* remarked that federal courts should invoke abstention rarely and have a "virtually unflagging obligation" to exercise the jurisdiction given them.

No "domestic relations" exception applies here. This matter should proceed in the District Court. It is not a "frivolous" claim. Petitioner does not seek to waste his time and the judiciary's resources. He seeks only the justice to which he is entitled.

CONCLUSION

THEREFORE, Petitioner Richard Manno requests of this Court that it grant his Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

RICHARD MANNO, *Pro Se*
43 Concklin Road
Pomona, New York 10970
(914) 354-4573

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN *WILLIAMS V. LAMBERT* DATED FEBRUARY 1, 1995

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 327—August Term, 1994

(Argued September 12, 1994

Decided February 1, 1995)

Docket No. 94-7290

ELIZABETH W. WILLIAMS,

Plaintiff-Appellant,

—v.—

BENJAMIN V. LAMBERT,

Defendant-Appellee.

Before:

OAKES, ALTIMARI and CABRANES,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, John E. Sprizzo, *Judge*, staying on the basis of *Pullman* absten-

tion an action brought by the mother of an illegitimate child seeking a declaratory judgment that the New York statutory scheme governing child support agreements violates the Equal Protection Clause. We find that the mother has standing to bring this claim and that her claim is ripe for adjudication. We find, further, that the district court abused its discretion in abstaining from the case.

The stay is vacated and the case is remanded for further proceedings.

ALLAN E. MAYEFSKY, New York, NY (Norman M. Sheresky, Baer Marks & Upham, of counsel), *for Plaintiff-Appellant*.

VICTORIA LEA SMITH, New York, NY, *for Defendant-Appellee*.

OAKES, *Senior Circuit Judge*:

Elizabeth Williams ("Williams") appeals from an order of the United States District Court for the Southern District of New York, John E. Sprizzo, *Judge*, staying her case pending the resolution of a concurrent state court proceeding. Williams filed this action seeking a declaratory judgment that Section 516 of the New York

Appendix A

Family Court Act, N.Y. Fam. Ct. Act § 516 (McKinney 1983) ("Section 516") violates the Equal Protection Clause of the United States Constitution because it treats illegitimate children differently from those born in wedlock. The district court held that it was appropriate to abstain from deciding the case under the *Pullman* abstention doctrine, *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), and stayed the case pending the resolution of the related state case. We vacate the stay and remand the case for further proceedings in the district court.

I. *Background*

Appellant Williams and Appellee Lambert had a brief sexual relationship in 1987. Nine months or so later, Williams gave birth to a son, Henry. Williams and Lambert were never married. In 1990, Williams sought child support from Lambert. Lambert consented to a DNA test which showed that there was a high probability that Lambert was Henry's father. Lambert and Williams entered into a support agreement pursuant to Section 516. Lambert paid Williams a one-time lump sum of $250,000 for Henry's support. At the same time, he explicitly denied paternity in the agreement. As required by Section 516, a social worker submitted an assessment of the agreement to a judge, and the judge approved the agreement.

Williams now alleges that at the time of the agreement Lambert misrepresented his financial condition and that he induced her to sign the agreement by resuming a sexual relationship with her during the negotiations and by

promising to participate in Henry's upbringing. She also alleges that her support agreement is inadequate because the parties, their attorneys and the court failed to apply the standards for child support under the New York Child Support Standards Act, Section 413 of the New York Family Court Act, N.Y. Fam. Ct. Act § 413 (McKinney 1983), and Section 240 of the New York Domestic Relations Law, N.Y. Dom. Rel. Law § 240 (McKinney 1988). These provisions establish the standards used to evaluate the support agreements between parents of legitimate children, including the "best interests of the child" test. N.Y. Dom. Rel. Law § 240.

Under Section 516, however, Williams is prohibited from petitioning the New York state courts for a modification of the support agreement. Section 516 provides that once a support agreement for an illegitimate child is approved by a judge and is fully performed, it may not be reexamined even if grounds for re-examination would exist for an agreement entered into between the parents of legitimate children.[1] A support agreement between the

---

[1] Section 516 provides:

(a) An agreement or compromise made by the mother or by some authorized person on behalf of either the mother or child concerning the support of either is binding upon the mother and child only when the court determines that adequate provision has been made and is fully secured and approves said agreement or compromise.

(b) No agreement or compromise under this section shall be approved until notice and opportunity to be heard are given to the public welfare official of the county, city or town where the mother resides or the child is found.

(c) *The complete performance of the agreement or compromise, when so approved, bars other remedies of the mother or child for the support and education of the child.*

(Cont'd)

parents of a legitimate child, on the other hand, is subject to future scrutiny by a court in light of its adequacy in meeting the best interests of the child, whether it was the product of fraud or overreaching, and whether changed circumstances justify a modification of the agreement. *Brescia v. Fitts*, 56 N.Y.2d 132, 436 N.E.2d 518, 451 N.Y.S.2d 68 (1982). Williams filed this case seeking a declaratory judgment that this statutory scheme violates the equal protection rights of illegitimate children and their parents.

In 1992, before filing this action, Williams showed Lambert a draft of the complaint, purportedly to facilitate settlement discussions. Lambert, in response, commenced a preemptive action in New York State Supreme Court, New York County, on November 5, 1992, alleging breach of the support agreement and intentional infliction of emotional distress and seeking a declaratory judgment that Section 516 complies with the New York and United States constitutions. On November 10, 1992, Williams filed her complaint in this case in the Southern District of New York. Williams also removed the state court action to federal court, and it was consolidated with the federal action.

On February 22, 1993, Lambert moved to stay or dismiss the federal action and to remand the state action to state court. Williams cross-moved for summary judg-

---

(Cont'd)

N.Y. Fam. Ct. Act § 516 (McKinney 1983) (emphasis added). Section 512 of the Act defines "child" as "child born out of wedlock." N.Y. Fam. Ct. Act § 512 (McKinney 1983).

ment. The district court dismissed the state causes of action and gave Lambert leave to renew the state claims in state court without also pleading the federal constitutional claim, which the judge suggested was merely an anticipation of Williams's defense. On June 15, 1993, Lambert filed a new complaint in New York Supreme Court that pled only the state law causes of action and therefore could not be removed to federal court.

The motions for stay or dismissal and for summary judgment were then renewed. The district court granted Lambert's motion to stay the federal case pending resolution of the state action on the basis of *Pullman* abstention. It held that issues of state law needed to be resolved before the court could decide whether the statute was unconstitutional. Williams appealed.

II. *Discussion*

A. *Standing*

Although the district court opinion does not address the issue of standing, Lambert raised the issue in the district court and raises it again on appeal. Standing doctrine, an essential part of the Article III requirement of a case or controversy, requires that a party seeking to invoke the jurisdiction of a federal court demonstrate an "injury in fact." *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992).

At oral argument, Lambert argued that Williams was not injured because she could petition the New York courts for modification of the support agreement pursuant to Section 165(a) of the New York Family Court

Act (McKinney 1983) ("Section 165(a)") and N.Y. Civ. Prac. L. & R. § 5015 (McKinney 1992) ("CPLR § 5015"). Section 165(a) provides that:

> . . . [W]here the method of procedure in any proceeding in which the family court has jurisdiction is not prescribed, the provisions of the civil practice law and rules shall apply to the extent that they are appropriate to the proceedings involved.

New York courts have construed this provision to allow parties in family court proceedings to move for relief pursuant to CPLR § 5015, which provides for relief from a court order "upon such terms as may be just," upon a showing of fraud, misrepresentation or misconduct by an adverse party.[2] *See, e.g., Pezner v. Schumeyer*, 509 N.Y.S.2d 724 (Fam. Ct. 1986).

Williams alleges in her complaint that at the time of the settlement negotiations, and at the time the state court approved her support agreement, she did not receive full financial disclosure from Lambert and that he fraudulently induced her to enter into the agreement by resuming a sexual relationship with her and by making false promises regarding his future role in raising their child. On the basis of these allegations, Williams

---

2 CPLR § 5015(a) states in relevant part:

> The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
>
> . . .
>
> 3. fraud, misrepresentation, or other misconduct of an adverse party; . . . .

:an seek a modification of the agreement by making a notion pursuant to CPLR § 5015 for relief from the state :ourt's order approving the support agreement.

Lambert also contends that Williams has not shown an 'injury in fact" because she has not alleged a financial need for modification of the agreement and she has not shown that the agreement would be eligible for modification under the standards applied to support agreements for legitimate children.

Whether Williams has standing turns on how her injury is defined. If, as Lambert argues, Williams's injury consists of a loss of child support money, then she does not have standing because success in this case would not guarantee a remedy to her injury. She would still have to petition the state court for modification, and she might not be successful there.

Determining "injury in fact" is not always easy. We are guided in this inquiry by the Supreme Court's recent decision in *Northeastern Florida Chapter of Associated General Contractors v. Jacksonville*, 113 S. Ct. 2297 (1993). That case, like the one before us, involved an equal protection claim. The plaintiff was a trade association challenging the constitutionality of an ordinance which required that ten percent of the money spent on city contracts be set aside for minority- or female-owned businesses. 113 S. Ct. at 2299. The association, whose membership consisted largely of businesses that were not minority- or female-owned, alleged that many of its members would have bid on certain set-aside contracts if it were not for the restrictions imposed by the ordinance. *Id.* The court of appeals held that the association

lacked standing because it had presented no evidence that any members would have actually obtained a contract if they had been allowed to compete. *Id.* at 2300. The Supreme Court reversed. Relying in part on *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), the Court held that the association's "injury in fact" was the contractors' "inability to compete on an equal footing in the bidding process, not the loss of a contract." *Id.* at 2303.

The Court explained, "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Id.* Instead, the member's injury is "the denial of equal treatment resulting from the imposition of the barrier." *Id.*

The Court's analysis of the contractor's "injury in fact" was grounded in the interest protected by the Equal Protection Clause.[3] The reasoning applies with the same force to Williams's equal protection claim. The New York legislature has created a barrier which makes it more difficult for a parent of an illegitimate child to have a support agreement modified than it is for a parent of a child born in wedlock. Williams is injured by the denial of equal access to the modification process. Her

---

[3] *See* Cass Sunstein, *Standing Injuries*, 1993 Sup. Ct. Rev. 37 (1993) (discussing how injury cannot be determined without reference to applicable law).

injury, that is, is her inability to modify her support agreement on the same basis as a parent of a legitimate child, not her inability to modify the agreement at all. The fact that CPLR § 5015 provides her with some basis for modification of the agreement does not strip her of standing because a motion under § 5015 would not entitle her to the same modification procedures as parents of legitimate children. It would not give her the right, that is, to have her agreement reviewed under the standards for child support set out in the New York Child Support Standards Act, Section 413 of the New York Family Court Act, or Section 240 of the New York Domestic Relations Law.

Just as the contractors did not have to show that they would have obtained the contracts had they bid, Williams need not show that she could successfully modify the support agreement if she were given access to the modification procedure. She has standing to seek redress for her claim of a denial of equal access to the modification process.

B. *Ripeness*

As with standing, the district court did not address ripeness in its opinion, but Lambert raised the issue in the district court and does so again on appeal. Lambert argues that Williams's claim is not ripe for adjudication because she has not yet made any affirmative attempt to modify the support agreement. He relies on the Court's holding in *Reno v. Catholic Social Services, Inc.*, 113 S. Ct. 2485 (1993), that the claims of illegal aliens' challenging Immigration and Naturalization Service temporary-resident regulations as contrary to the statute

under which they were promulgated were not ripe. This was true, the Court held, because a "class member's claim would ripen only once he took the affirmative steps that he could take before the INS blocked his path by applying the regulation to him." *Id.* at 2496.

In *Associated General Contractors*, the Court found the trade association's challenge ripe even though the association's members had never attempted to bid on the minority set-aside contracts. The distinction between the cases, the *Catholic Social Services* Court reasoned, was that while the contractors had historically applied for similar contracts (supporting a finding they would have bid on the set-aside contracts absent the statutory restrictions), the aliens in *Catholic Social Services*, in contrast, had presented no evidence that they would have applied for temporary resident status in the absence of the INS regulations. *Catholic Social Servs.*, 113 S. Ct. at 2496 n.19. We note, furthermore, that in *Catholic Social Services*, the deadline for the temporary resident applications had already passed. *Id.* at 2492. The class members claimed after the fact that they would have applied if they could have. *Id.*

These distinctions are relevant to the case before us. Unlike the alien class in *Catholic Social Services*, Williams could still file a petition in the New York state courts for a modification of her agreement. Such a gesture, however, would be a futile one, as her case would be dismissed summarily under the clear language of Section 516. *See, e.g., Avildsen v. Prystay*, 171 A.D.2d 13, 574 N.Y.S.2d 535 (1st Dep't 1991) (barring claim that support agreement was unconscionable); *Daniel J.G. v.*

Michael M., 150 Misc.2d 784, 789, 571 N.Y.S.2d 372 (Sup. Ct. 1991) (barring claim that support agreement was inadequate). We will not require such a futile gesture as a prerequisite for adjudication in federal court. *Cf. International Bhd. of Teamsters v. United States*, 431 U.S. 324, 365-68 (1977) (a person who never applied for a job is entitled to retroactive seniority if he can show that applying would have been a futile gesture because of the employer's pervasive discriminatory hiring practices).

C. *Abstention*

The district court abstained from deciding the merits of this case and stayed the proceedings pending the outcome of the state court action. Orders to abstain are final under 28 U.S.C. § 1291 and are therefore appealable. *United Fence & Guard Rail Corp. v. Cuomo*, 878 F.2d 588, 592 (2d Cir. 1989) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). Review of a district court's decision to stay a case on abstention grounds is limited to an abuse of discretion standard. *See Law Enforcement Ins. Co. v. Corcoran*, 807 F.2d 38, 40 (2d Cir. 1986), *cert. denied*, 481 U.S. 1017 (1987).

As a policy matter, district courts should abstain from hearing cases only under very unusual or exceptional circumstances. *United Fence*, 878 F.2d at 593; *West v. Village of Morrisville*, 728 F.2d 130, 135 (2d. Cir. 1984). The Supreme Court has written,

> The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and nar-

> row exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976) (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959)).

The district court relied on the *Pullman* abstention doctrine in its decision to stay Williams's claim pending the resolution of Lambert's state court case. The *Pullman* doctrine requires that "federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984).

Three basic conditions must be present to trigger *Pullman* abstention:

> First, the state statute must be unclear or the issue of state law uncertain; second, resolution of the federal issue must depend upon the interpretation given to the ambiguous state provision; and third, the state law must be susceptible of an interpretation that would avoid or modify the federal constitutional issue.

United Fence, 878 F.2d at 594.

Appendix A

The district court held that the issue of state law in this case is uncertain because the New York Court of Appeals case that upheld the constitutionality of Section 516, *Bacon v. Bacon*, 46 N.Y.2d 477, 386 N.E.2d 1327, 414 N.Y.S.2d 307 (1979) (*per curiam*), was decided nearly ten years before *Clark v. Jeter*, 486 U.S. 456 (1988), in which the Supreme Court concluded that in light of the new technology available to assist in determining paternity (DNA tests), a shorter statute of limitations for paternity suits brought by illegitimate children violated the Equal Protection Clause. The district court found it impossible to predict whether the Court of Appeals would revise its opinion in light of the technology now available.

The district court also found that the law is susceptible to an interpretation that would avoid or modify the constitutional issue. The district court pointed to the 4-2 decision, *Commissioner of Social Services v. Ruben O.*, 80 N.Y.2d 409, 605 N.E.2d 334, 590 N.Y.S.2d 847 (1992), to show that the state court could interpret Section 516 in a way that avoids the constitutional issue. In *Ruben O.*, the Court of Appeals held that where the parents of an illegitimate child have entered into a support agreement pursuant to Section 516, and the child later becomes a charge of the state, the Commissioner of Social Services is not bound by the original support agreement and may seek child support based upon the child's needs. *Ruben O.*, 80 N.Y.2d at 414, 605 N.E.2d at 337, 590 N.Y.S.2d at 851.

We cannot agree with the district court's reasoning. First, the "issue of state law" involved in our case that

the district court found unresolved is an issue of both federal and New York state constitutional law. Federal courts do not need to wait for a state court's interpretation of federal constitutional law. "The jurisdictional sword that sustains federal rights should not be swiftly sheathed simply because a concurrent parallel attack has been mounted in the state courts." *United Fence*, 878 F.2d at 595. In addition, where the state might be willing to recognize under its constitution the same rights as the plaintiff claims under the federal Constitution, "it is now settled that when state and federal laws overlap in this fashion, plaintiffs are not precluded from choosing the federal forum." *McRedmond v. Wilson*, 533 F.2d 757, 763 (2d Cir. 1976). Accordingly, the fact that Williams has counterclaimed in the state court action for a declaration that Section 516 violates the New York and federal constitutions does not provide an adequate ground for abstention in the federal court.

Second, the statute is clear on its face, and there is no indication that it has been interpreted in any unclear way. It has been used repeatedly in recent years to prevent mothers of illegitimate children from revising support agreements. *See supra*, Section II(B). *Ruben O.*, upon which the district court relies, is not to the contrary. *Ruben O.* was not an interpretation of Section 516 but instead was an interpretation of statutory sections governing the Commissioner. The Court of Appeals held that the Commissioner is not bound by agreements made under Section 516 because Sections 545(1), 513, 413(1) and 571 authorize the Commissioner to seek a child support award based upon the child's needs and the noncustodial parent's means, and Section 571 indicates that

this power is not limited by Section 516. *Ruben O.*, 80 N.Y.2d at 415, 605 N.E.2d at 337, 590 N.Y.S.2d at 850.

Unlike the Commissioner in *Ruben O.*, Williams is bound by the terms of Section 516. She is within the class of people at whom the statute is directed—namely, parents of illegitimate children. No statutory construction could avoid that fact. Consequently, the district court's reliance on the *Pullman* abstention doctrine was inappropriate and constituted an abuse of discretion.

The district court considered other types of abstention, and Lambert raises them as possible justifications for the district court's decision to abstain. They are equally inapplicable in this case. *Younger* abstention requires that in the absence of bad faith, fraud or irreparable harm, a federal court must abstain from enjoining ongoing state criminal proceedings. *Younger v. Harris*, 401 U.S. 37 (1971). The *Younger* abstention doctrine has been extended to prohibit federal courts from enjoining ongoing state civil proceedings that involve important state interests if the state forum provides the federal plaintiff a full and fair opportunity to pursue his or her claims. *See, e.g., Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10-17 (1987); *see also City of Hartford v. Chase*, 942 F.2d 130, 136 (2d Cir. 1991) (noting that Younger abstention applies to state administrative proceedings). In this case, Williams has not asked that any state proceeding be enjoined. In the pending state case, Lambert alleges a breach of the support agreement and intentional infliction of emotional distress. Williams counterclaims for a declaration that Section 516 violated the New York and the United States Constitutions. A decision in

Williams's favor in the federal case would have only the effect of mooting her counterclaim and of allowing her to initiate a separate case for modification of the support agreement. This situation does not present the issues of state and federal comity with which *Younger* is concerned. *See City of Hartford*, 942 F.2d at 136; *cf. Steffel v. Thompson*, 415 U.S. 452 (1974) (under *Younger* abstention, a federal court need not abstain from issuing declaratory relief where the state criminal prosecution has not yet been initiated).

Burford abstention, first articulated in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), requires federal courts to decline to exercise jurisdiction over cases which involve difficult issues of state law bearing on policy problems of substantial public import. *Minot v. Eckardt-Minot*, 13 F.3d 590, 593 (2d Cir. 1994) (remanding a child custody case in which plaintiff sought recognition of new tort theory under state law). In the instant case, the only claim in federal court is one for a declaratory judgment under the federal Constitution. *Burford* abstention is not applicable because the district court was not asked to adjudicate any facts or to fashion public policy on behalf of the state in a way that would unduly interfere with the efficient operation of an elaborate state regulatory scheme. *Burford*, 319 U.S. at 327, 332; *Meredith v. Winter Haven*, 320 U.S. 228, 235 (1943); *Bethpage Lutheran Serv., Inc. v. Weicker*, 965 F.2d 1239, 1247 (2d Cir. 1992); *City of Hartford*, 942 F.2d at 136-37.

The doctrine articulated in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1975) is also inapplicable. In that case, the Supreme

Court held that, for reasons of wise judicial administration, the federal court should have dismissed the case involving water rights and allowed it to proceed in state court. *Id.* at 818. The Court held that "the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention." *Id.* The Court made no hard and fast rules guiding the determination of whether the exceptional circumstances exist which justify dismissal of the federal case, but instead advocated a balancing of certain factors. *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15-16 (1982) (interpreting *Colorado River*, 424 U.S. at 818-19). This circuit has interpreted this doctrine as requiring that the following facors be examined:

> (1) assumption of jurisdiction over a *res*; (2) inconvenience of the forum; (3) avoidance of piecemeal litigation; (4) order in which the actions were filed; (5) the law that provides the rule of decision; and (6) protection of the federal plaintiff's rights.

De Cisneros v. Younger, 871 F.2d 305, 307 (2d Cir. 1989).

In this case, there is no evidence that exceptional circumstances exist. There is no allegation by either party that the federal forum is inconvenient. No harm will be caused by the piecemeal litigation—the constitutional issue can be cleanly decided in the federal court, and the state claims in the state court. Additionally, this federal action was commenced before the action currently pending in the state court, and the applicable law is federal

constitutional law. Therefore, *Colorado River* provides no reason to stay this case.

Lastly, the general policy that federal courts should abstain from deciding cases that involve matrimonial and domestic relations issues is not applicable here. The matrimonial exception to diversity jurisdiction, as articulated in *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859), is still in effect today—federal courts will not exercise jurisdiction over cases on the subjects of divorce, alimony or the custody of children. *Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2214-15 (1992); *American Airlines, Inc. v. Block*, 905 F.2d 12, 14 (2d Cir. 1990). *See also Phillips, Nizer, Benjamin, Krim & Ballon v. Rosensteil*, 490 F.2d 509 (2d Cir. 1973). However, the Court in *Ankenbrandt* held that the matrimonial exception to federal jurisdiction is not based on Article III of the Constitution but is instead an interpretation of the diversity statute, 28 U.S.C. § 1332. 112 S. Ct. at 2213-14. It also found that the exception is very narrow. The Court stated that "[t]he *Barber* Court . . . did not intend to strip the federal courts of authority to hear cases arising from the domestic relations of persons unless they seek the granting or modification of a divorce or alimony decree," *id.* at 2214, or a child custody decree. *Id.* at 2215.

This case does not involve such a decree, and it is before this Court on federal question jurisdiction, not diversity. Therefore, the matrimonial exception does not apply.

III. *Conclusion*

Williams has standing to bring this declaratory judgment action, and her claim is ripe for adjudication. The district court abused its discretion by abstaining from the case. Therefore, the order of the district court staying the case is vacated, and the case is remanded to the district court for further proceedings.

FILED
MAY 6 1994
OFFICE OF THE CLERK

NO. 93-1353

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

UNITED STATES OF AMERICA, Petitioner

v.

DONALD L. SIMPSON and RODOLFO MOLINA, JR., Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT MOLINA'S BRIEF IN OPPOSITION

John G. Bogart, Esq.
257 North Stone Avenue
Tucson, Arizona 85701
(602) 624-8196
Counsel of Record
for Respondent
Rodolfo Molina, Jr.

TABLE OF CONTENTS

	PAGE
Table of Contents	i
Table of Authorities	ii
Constitutional Amendments Involved	2
Statement of the Case	2
Reasons Why The Petition Should Be Denied . . .	2
Conclusion	6

TABLE OF AUTHORITIES

	PAGE
CASES:	
United States v. Shabani, 993 F.2d 1419 (9th Cir.,1993); Cert. granted, #93-981 (02/22/94)	2, 3
CONSTITUTIONAL AMENDMENTS:	
United States Constitution, Amendment I	2, 3, 4
United States Constitution, Amendment VIII	2, 3, 4, 5
STATUTES:	
Title 21, U.S.C. §846	3, 4, 5

NO. 93-1353

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

UNITED STATES OF AMERICA, Petitioner

v.

DONALD L. SIMPSON and RODOLFO MOLINA, JR., Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT MOLINA'S BRIEF IN OPPOSITION

The Respondent, Rodolfo Molina, Jr., respectfully requests that this Court deny the Petition for Writ of Certiorari, filed by Petitioner United States of America, seeking review of the Ninth Circuit Court's judgment in this case.

CONSTITUTIONAL AMENDMENTS INVOLVED

Amendment I provides:

> **Freedom of religion, speech and press; peaceful assemblage; petition for grievances**
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment VIII provides:

> **Excessive bail, fines, punishments**
>
> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

STATEMENT OF THE CASE

Respondent concurs with the Statement of the Case as presented by the Government, and supplements that Statement with the fact that the only count of the Indictment, Court II, which alleged a substantive drug offense against Respondent, and of which he was acquitted, involved between one and one-half to two and one-half (1.5 - 2.5) grams of cocaine. [92-10158, Resp. CA Br. 24; Govt. CA Br. 25; CA Excerpt of Record 53]

REASONS WHY THE PETITION SHOULD BE DENIED

The government contends that this Court should grant certiorari because this case presents the same issue as United States v. Shabani, 993 F.2d 1419 (9th Cir., 1993); Cert. granted,

#93-981 (February 22, 1994), stating that the Court's decision in *Shabani* would effect the outcome of this case.[1] Accordingly, Respondent incorporates by reference Respondent's Brief in Opposition filed in United States v. Shabani.

The Government's argument and reasoning why this Court should grant certiorari, in both United States v. Shabani and the case at bar, fails to consider that there may be legitimate, constitutional reasoning upon which the Ninth Circuit Court of Appeals has consistently required proof of an overt act for a conviction under Title 21, U.S.C. §846, although not explicitly stated by that Court in its opinions. Respondent respectfully suggests to this Court that the Ninth Circuit Court of Appeal's position is logically supported by the First and Eighth Amendments to the United States Constitution.

It is submitted that inherent in the Ninth Circuit Court's requirement that an overt act be proven to sustain a conviction under Title 21, U.S.C. §846, is the Court's unstated belief that to convict a person of conspiracy without an overt act would be in violation of the First Amendment to the United States Constitution.

The First Amendment to the United States Constitution prohibits congressional restraint upon freedom of speech and thought. As argued by the government, the overwhelming weight of authority now holds that proof of an overt act is not necessary for a conviction under any criminal conspiracy statute which does not specifically require proof of an overt act. Accordingly, under

---

[1] See, Petition, pp 5-6.

Title 21, U.S.C. §846, all that is necessary to be proven for conviction of conspiracy is an agreement between two or more people to commit at least one crime as charged in the Indictment, (or, any offense defined in the subchapter [a narcotics offense]), and becoming a member of the conspiracy knowing at least one of its objects, with the intent to help accomplish it. Ninth Circuit Criminal Jury Instruction 8.05A (1992).

As a result, under Title U.S.C. §846, with no action or overt act needed to be proven for conviction, it follows that a person may be convicted solely upon his or her words or expressed thoughts, and not actions. If the First Amendment right to freedom of speech is to have any meaning when applied to criminal conspiracy statutes, those criminal conspiracy statutes which do not require proof of an overt act, to include Title 21, U.S.C. §846, must be declared to be in violation of the First Amendment to the United States Constitution.

It is further submitted that the majority position, that Title 21, U.S.C. §846 requires no overt act and that a citizen may be convicted solely upon his or her words or expressed thoughts, is in violation of the Eighth Amendment to the United States Constitution.

The Eighth Amendment to the United States Constitution provides that no cruel or unusual punishment shall be inflicted upon the citizenry of the United States. To convict a person solely for speech or thought, and then to sentence that person to

inordinately long periods of incarceration, is truly cruel and unusual punishment.

For example, in the case at bar, Respondent Molina was sentenced, pursuant to Title 21, U.S.C. §846 and the United States Sentencing Guidelines, to three hundred sixty-five (365) months imprisonment.[2] This sentence, in excess of thirty (30) years imprisonment, resulted from conversations about five hundred (500) kilograms of cocaine. The only alleged cocaine involved, the sample alleged to have been delivered on January 28, 1991, had a total weight of one and one-half to two and one-half (1.5 - 2.5) grams. Significantly, Respondent Molina was acquitted on that count (Count II). Count II was "... the only substantive [drug] offense with which they were charged."[3] The net result, therefore, was that Respondent Molina received over thirty (30) years imprisonment for talking about committing a narcotics offense, as he was acquitted of any substantive allegation of possession or distribution of narcotics.

Under the majority position, mere talk, with no substantive offense proven, can result in extremely long and harsh imprisonment. Clearly, this is cruel and unusual punishment, and must be declared to be in violation of the Eighth Amendment to the United States Constitution.

///

---

[2] See, Petition, p 2.

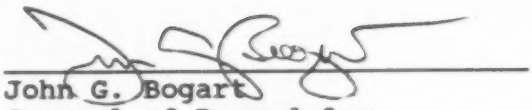
[3] See, Petition, p 4.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

DATED: May 16, 1994.

RESPECTFULLY SUBMITTED,



John G. Bogart
Counsel of Record for
Respondent Rodolfo Molina, Jr.

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of Respondent Molina's Brief in Opposition was mailed/delivered this 6th day of May, 1994, to:

Mr. Drew S. Days, III
Solicitor General
Department of Justice
10th & Constitution Ave., N.W., Room #5614
Washington, D.C. 20530

I hereby certify that one (1) copy of the Respondent Molina's Brief in Opposition was mailed this 6th day of May, 1994, to:

Rodolfo Molina, Jr.
% Minnesota Correctional Facility
Oak Park Heights
Post Office Box 10
Stillwater, Minnesota 55082-0010

DATED this 6th day of May, 1994.

John G. Bogart
Counsel of Record for
Respondent Rodolfo Molina, Jr.